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Children Should Be Seen AND Heard in Florida Custody Determinations

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I. INTRODUCTION

Have you ever felt like nobody?
 Just a tiny spec of air.
 When everyone's around you,
 And you are just not there.¹

Divorce, that once unspoken condition considered the breakup of a family, now reflects a growing way of life for America's families. In 1998, "19.4 million adults nationwide were divorced, representing nine point eight percent of the population."² Florida is no exception to this phenomenon. In Florida in 1990, over one million adults were registered as divorced, representing ten percent of the adult population.³ Accompanying this increasing divorce rate is an evolving generation of children growing up in single parent households. According to the Current Population Survey, in 1970 only twelve percent of children under eighteen years of age lived in single parent households.⁴ This number grew to twenty three percent in 1980, to twenty seven percent in 1990, and to thirty two percent in 1998.⁵ Today, these percentages equate to over twenty million American children under eighteen years old living in one parent households.⁶ The changing face of America's families and household situations creates new challenges not only for health care professionals, school planners, and childcare providers, but also for legislators and judicial officials. Specifically, legislators and judicial officials grapple with the problem of how to balance the feelings and desires of the children affected by divorce with the interests of society for stable, clear laws. Florida's courts and legislators expressly state that they place the "best interests" of the children as the primary focus in divorce issues.⁷ However, in reality, few actually consider the children's opinion when establishing these best interests.

1. JACK CANFIELD ET AL., *CHICKEN SOUP FOR THE KID'S SOUL* 83 (1998) (quoting nine year old Karen Crawford).

2. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, PUB. NO. PPL-100, *MARITAL STATUS AND LIVING ARRANGEMENTS* (1998).

3. TERRY A. LUGAILA, U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, *MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1998 (UPDATE)* available at <http://www.census.gov/population/socdemo/ms-la/tabms-st1.txt>.

4. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE; BUREAU OF THE CENSUS, *CENSUS BRIEF, AMERICA'S CHILDREN AT RISK*, (1997).

5. U.S. CENSUS BUREAU, *POPULATION PROFILE OF THE UNITED STATES, FROM BIRTH TO SEVENTEEN: THE LIVING ARRANGEMENTS OF CHILDREN, 1998* (1999).

6. *Id.*

7. See, e.g., *Marshall v. Reams*, 14 So. 95, 96 (Fla. 1893) (holding that the benefit and welfare of the child is the "pole star" by which courts are guided).

Divorce impacts a child's life in a major way. From the child's perspective, the finality associated with custody proceedings provokes strong feelings of duress.⁸ As the opening poem of this article suggests,⁹ they watch their world collapse around them while nobody takes the time to ask their opinions. Custody decisions determine not only with whom the child will live, but also geographically where the child will reside, and under what conditions the child will be raised.¹⁰ Increasingly, "the laws of this nation recognize that children have a legitimate interest in the important decisions affecting their lives."¹¹ Most states today, either through statutory mandate or through common law practice, acknowledge the benefit of listening to and including as a determinative factor, the children's preferences in custody decisions.¹²

Florida, among the least progressive states on this issue,¹³ statutorily includes a child's preference as one of a multiplicity of *suggested* factors for courts to consider in custody determinations.¹⁴ As Part IV of this article

8. Randy Frances Kandel, *Just Ask the Kid! Towards a Rule of Children's Choice in Custody Determinations*, 49 U. MIAMI L. REV. 299, 358 (1994).

9. CANFIELD ET AL., *supra* note 1.

10. Wallace J. Mlynaiac, *A Judge's Ethical Dilemma: Assessing a Child's Capacity to Choose*, 64 FORDHAM L. REV. 1873 (1996). "Judges determine where children will live, with whom they will live, how they will live, and what will be done to, by, or for them." *Id.*

11. Elizabeth S. Scott et al., *Children's Preference in Adjudicated Custody Decisions*, 22 GA. L. REV. 1035, 1039-40 (1988).

12. See discussion *infra* Part II.

13. See discussion *infra* Part III.

14. FLA. STAT. § 61.13(3) (2000). The statute states:

(3) For purposes of shared parental responsibility and primary residence, the best interests of the child shall include an evaluation of all factors affecting the welfare and interests of the child, including, but not limited to:

- (a) The parent who is more likely to allow the child frequent and continuing contact with the nonresidential parent.
- (b) The love, affection, and other emotional ties existing between the parents and the child.
- (c) The capacity and disposition of the parents to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs.
- (d) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.
- (e) The permanence, as a family unit, of the existing or proposed custodial home.
- (f) The moral fitness of the parents.
- (g) The mental and physical health of the parents.
- (h) The home, school, and community record of the child;

shows, the broad spectrum of interpretation given to this statute by Florida's courts and judges has created a chaotic environment for divorce litigation.¹⁵ Is this chaos in the best interests of the children?

Many of Florida's cities and towns have developed plans to attract younger residents.¹⁶ These plans are working.¹⁷ The residents of Florida are getting younger.¹⁸ Younger residents desire modern approaches to their legal problems. As this article will show, requiring courts to consider children's preferences in custody determinations will move Florida back into a leadership position, making the state more attractive to a younger population. Part II of the article explores the national trend, specifically identifying four categories of legal approaches taken by the fifty-one jurisdictions around the nation. Part III describes Florida's current legislation; and Part IV explores the multiplicity of interpretations Florida's courts have given to this legislation. Part V rounds out the analysis by evaluating judges' responses to children's expressions of preference. Taken together, the article

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- (i) The reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference;
 - (j) The willingness and ability of each parent to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent;
 - (k) Evidence that any party has knowingly provided false information to the court regarding a domestic violence proceeding pursuant to s. 741.30;
 - (l) Evidence of domestic violence or child abuse;
 - (m) Any other fact considered by the court to be relevant.

Id.

15. See discussion *infra* Part IV.

16. See, e.g., Sallie James, *Shaping Their Images: Cities in Central and North Broward are Trying to Strike Balances as They Deal with Growth, Development, and Generally Younger Demographics*, SUN-SENTINEL (Ft. Lauderdale), Nov. 8, 1997, at 33 (discussing changing demographics "as young families move into neighborhoods once limited to seniors"); Madelaine Gonzalez, *Posner's Proposal on Condos Stirs Fear: Hallandale is Hoping To Lure Younger People*, SUN-SENTINEL (Ft. Lauderdale), Oct. 22, 1996, at 1B (discussing city commissioner's goal of attracting a younger population to Hallandale).

17. See Robert Sargent Jr., *The Villages is Quietly Growing More Youthful; Despite What You See in Ads, The Community is Home to More and More People Who Aren't Ready for Retirement Yet*, ORLANDO SENTINEL TRIBUNE, Aug. 19, 1998, Lake Sentinel at 1 (noting that "[m]ore and more residents 30 to 40 years olds are buying or inheriting homes"); see also David K. Rogers, *St. Petersburg Wears Younger Face*, ST. PETERSBURG TIMES, May 2, 1995, at 3B (discussing the affects of the "influx of young families and vacationers of all ages"); Terry Sheridan, *Deerfield Cove Area Attracting Younger Buyers*, BROWARD DAILY BUS. REV., Sept. 24, 1997, at A2 (noting the trend since 1994 towards younger buyers).

18. *Id.*

clearly justifies the assertion that Florida should adopt legislation mandating consideration of children's preferences in child custody decisions.

II. THE NATIONAL TREND

The growing trend around the nation is acquiescence to children's wishes in custody determinations.¹⁹ Each year, an increasing number of states adopt legislation requiring courts to consider children's preferences.²⁰ In 1977, there were sixteen states in which the affected children's preference was a mandatory consideration.²¹ This number grew to thirty-two jurisdictions in 1998.²² Today, thirty-four jurisdictions statutorily mandate that courts consider children's preferences in custody determinations.²³ Among these thirty-four jurisdictions, twelve consider the child's preference as the

19. Kathleen Nemecheck, Note, *Child Preference in Custody Decisions: Where We Have Been, Where We Are Now, Where We Should Go*, 83 IOWA L. REV. 437, 445 (1998).

20. *Id.* at 443 (noting that states began to seriously consider statutory guarantees after the passage of the Uniform Marriage and Divorce Act in 1970).

21. *Id.* at 445. Among the sixteen states were: California, Connecticut, Georgia, Hawaii, Michigan, Minnesota, Nebraska, Ohio, and Texas. *Id.* at 444 n.60, 61.

22. *Id.* at 445. These jurisdictions included: Alaska, Arizona, Connecticut, Colorado, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin.

23. These states include: Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Pennsylvania, South Carolina, Texas, Tennessee, Virginia, Washington, and Wisconsin. See ALASKA STAT. § 25.24.150 (Michie 2000); ARIZ. REV. STAT. § 25-403(A)(2) (2000); CAL. FAM. CODE § 3042(a) (West 2000); COLO. REV. STAT. § 14-10-124 (2000); CONN. GEN. STAT. § 46b-57 (2000); DEL. CODE ANN. tit. 13, § 722 (2000); D.C. CODE ANN. § 16-911(5)(A) (2000); GA. CODE ANN. § 19-9-1(a)(3) (2000); HAW. REV. STAT. § 571-46(3) (2000); IDAHO CODE § 32-717 (Michie 2000); 750 ILL. COMP. STAT. 5/602(a)(2) (West 2000); IND. CODE § 31-14-13-2 (2000); IOWA CODE § 598.41(3)(f) (2000); KAN. STAT. ANN. § 60-1610 (2000); KY. REV. STAT. ANN. § 403.270(2)(B) (Banks-Baldwin 2000); ME. REV. STAT. ANN. tit.19-A, § 1653 (West 2000); MD. CODE ANN. FAM. LAW § 9-103 (2000); MICH. COMP. LAWS § 722.23(3)(i) (2000); MINN. STAT. § 518.17 (2000); MISS. CODE ANN. § 93-11-65 (2000); MO. REV. STAT. § 452.375 (2000); MONT. CODE ANN. § 40-4-212(1)(B) (2000); NEB. REV. STAT. § 42-364 (2)(b) (2000); NEV. REV. STAT. § 125.480(4)(a) (2000); N.J. STAT. ANN. § 9:2-4 (West 2000); N.M. STAT. ANN. § 40-4-9 (Michie 2000); N.D. CENT. CODE § 14-09-06.2(1)(i) (2000); 23 PA. CODE § 5303(a)(1) (2000); S.C. CODE ANN. § 20-7-1515 (Law. Co-op. 2000); TEX. FAM. CODE ANN. § 153.008 (Vernon 2000); TENN. CODE ANN. § 36-6-106 (2000); VA. CODE ANN. § 20-124.3 (Michie 2000); WASH. REV. CODE § 26.09.187(3)(vi) (2000); WIS. STAT. § 767.24 (2000).

key and controlling determining factor.²⁴ Another twenty-two states statutorily mandate courts consider the child's preference along with other factors when making custody determinations.²⁵ Of the seventeen remaining states, seven have permissive statutes suggesting that courts consider a child's preference in such determinations.²⁶ Florida is among these seven states with permissive legislation.²⁷ Only ten states make no mention of children's preferences in custody determinations in their statutes.²⁸ In most states in these last two categories having no statutory mandate, however, courts are still giving weight to the wishes of the children.²⁹ The remainder of this section will explore in more detail each of these described legislative groups.

24. These states include: California, Connecticut, Georgia, Hawaii, Maryland, Mississippi, Nebraska, Nevada, New Mexico, Pennsylvania, South Carolina, and Texas. *See* CAL. FAM. CODE § 3042 (a) (West 2000); CONN. GEN. STAT. § 46b-57 (2000); GA. CODE ANN. § 19-9-1(a)(3) (2000); HAW. REV. STAT. § 571-46(3) (2000); MD. CODE ANN. FAM. LAW § 9-103 (2000); MISS. CODE ANN. § 93-11-65 (2000); NEB. REV. STAT. § 42-364 (2)(b) (2000); NEV. REV. STAT. § 125.480(4)(a) (2000); N.M. STAT ANN. § 40-4-9 (Michie 2000); 23 PA. CODE § 5303(a)(1) (2000); S.C. CODE ANN. § 20-7-1515 (Law. Co-op. 2000); TEX. FAM. CODE ANN. § 153.008 (Vernon 2000).

25. These jurisdictions include: Alaska, Arizona, Colorado, Delaware, District of Columbia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Michigan, Minnesota, Missouri, Montana, New Jersey, North Dakota, Tennessee, Virginia, Washington, and Wisconsin. *See* ALASKA STAT. § 25.24.150 (Michie 2000); ARIZ. REV. STAT. § 25-403(A)(2) (2000); COLO. REV. STAT. § 14-10-124 (2000); DEL. CODE ANN. tit. 13, § 722 (2000); D.C. CODE ANN. § 16-911(5)(A) (2000); IDAHO CODE § 32-717 (Michie 2000); 750 ILL. COMP. STAT. 5/602(a)(2) (West 2000); IND. CODE § 31-14-13-2 (2000); IOWA CODE § 598.41(3)(f) (2000); KAN. STAT. ANN. § 60-1610 (2000); KY. REV. STAT. ANN. § 403.270(2)(B) (Banks-Baldwin 2000); ME. REV. STAT. ANN. tit.19-A, § 1653 (West 2000); MICH. COMP. LAWS § 722.23(3)(i) (2000); MINN. STAT. § 518.17 (2000); MO. REV. STAT. § 452.375 (2000); MONT. CODE ANN. § 40-4-212(1)(B) (2000); N.J. STAT. ANN. § 9:2-4 (West 2000); N.D. CENT. CODE § 14-09-06.2(1)(i) (2000); TENN. CODE ANN. § 36-6-106 (2000); VA. CODE ANN. § 20-124.3 (Michie 2000); WASH. REV. CODE § 26.09.187(3)(vi) (2000); WIS. STAT. § 767.24 (2000).

26. These states include: Florida, Louisiana, New Hampshire, Ohio, Oklahoma, South Dakota, and Utah. *See* FLA. STAT. § 61.13(3)(i) (2000); LA. CIV. CODE ANN. art. 134 (West 1999); N.H. REV. STAT. ANN. § 458:17 (VI) (2000); OHIO REV. CODE ANN. § 3109.04(B)(1) (West 2000); OKLA. STAT. Tit. 43, § 113 (2000); S.D. CODIFIED LAWS § 25-4-45 (Michie 2000); UTAH CODE ANN. § 30-3-10(1) (2000).

27. FLA. STAT. § 61.13(3)(i) (2000).

28. These states include: Alabama, Arkansas, Massachusetts, North Carolina, New York, Oregon, Rhode Island, Virginia, Vermont, and Wyoming. *See* ALA. CODE § 30-3-152 (2000); ARK. CODE ANN. § 9-13-101 (Michie 2000); MASS. GEN. LAWS ch. 208, § 31 (2000); N.C. GEN. STAT. § 50-13.2 (2000); N.Y. DOM. REL. LAW § 240 (McKinney 2000); OR. REV. STAT. § 107.137 (2000); R.I. GEN. LAWS § 15-5-16 (2000); VA. CODE § 48-10-4 (2000); VT. STAT. ANN. tit. 15, § 665 (2000); WYO. STAT. ANN. § 20-2-201 (2000).

29. *See* discussion *infra* Part III.

A. *Mandatory Statutes Granting Controlling Weight to Child's Preference*

The most progressive preference statutes are those granting *controlling weight* to the children's preference.³⁰ These statutes require the courts to solicit a child's preference before making a custody determination.³¹ Further, these statutes require that the child's preference control the court's decision.³² Twelve states currently grant controlling weight to a child's preference in custody determinations.³³ The most liberal of these, Pennsylvania, with no additional conditions, requires the court to consider the preference of the child in making an order for custody or partial custody.³⁴ Similarly, the majority of the other states in this category mandate the courts' consideration of the child's preference subject to the additional condition of the child's ability to reason intelligently.³⁵ Some courts interpret the child's ability to reason intelligently, strictly as an age restriction. Others evaluate the individual child's reasoning ability. Still others evaluate the reasonableness of the individual child's expressed wishes.

In Georgia, Maryland, Mississippi, New Mexico, and Texas, the child's preference is a controlling factor if that child has reached a specified age.³⁶ For example, the Mississippi Code states:

Provided, however, that if the court shall find that both parties are fit and proper persons to have custody of the children, and that either

30. Nemecheck, *supra* note 19, at 446.

31. *Id.* at 445 n.68.

32. *Id.* at 446.

33. *See supra* note 24.

34. 23 PA. CODE § 5303(a)(1) (2000). "In making an order for custody or partial custody, the court shall consider the preference of the child as well as any other factor which legitimately impacts the child's physical, intellectual and emotional well-being." *Id.*

35. *See* CAL. FAM. CODE § 3042 (a) (West 2000). "If a child is of sufficient age and capacity to reason as to form an intelligent preference as to custody, the court shall consider and give due weight to the wishes of the child in making an order granting or modifying custody." *Id.* *See also* CONN. GEN. STAT. § 46b-57 (2000) ("giving consideration to the wishes of the child if he is of sufficient age and capable of forming an intelligent preference."); HAW. REV. STAT. § 571-46(3) (2000). "If a child is of sufficient age and capacity to reason, so as to form an intelligent preference, the child's wishes as to custody shall be considered and be given due weight by the court." *Id.* *See also* NEB. REV. STAT. § 42-364 (2) (2000). "[T]he court shall consider . . . (b) [t]he desires and wishes of the minor child if of an age of comprehension regardless of chronological age." *Id.* *See also* NEV. REV. STAT. § 125.480(4) (2000). "The court shall consider . . . (a) [t]he wishes of the child if the child is of sufficient age and capacity to form an intelligent preference as to his custody." *Id.*

36. *See* GA. CODE ANN. § 19-9-1(a)(3) (2000); MD. CODE ANN. § 9-103 (2000); MISS. CODE ANN. § 93-11-65 (2000); N.M. STAT ANN. § 40-4-9 (Michie 2000); TEX. FAM. CODE ANN. § 153.008 (West 2000).

party is able to adequately provide for the care and maintenance of the children, and that it would be to the best interest and welfare of the children, then any such child who shall have reached his *twelfth* birthday shall have the privilege of choosing the parent with whom he shall live.³⁷

Similarly, the Georgia code provides that at the age of fourteen, the child has the right to select with whom he or she desires to live.³⁸ Georgia code mandates that the child's selection is always controlling unless the parent selected is deemed not fit to have custody.³⁹ In New Mexico, the court must consider the desires of a minor who is fourteen years of age or older.⁴⁰ In Texas, a child of ten years of age or older has the right to choose his/her guardian subject to court approval.⁴¹ In Maryland, a child who is sixteen years or older has the right to file a petition to change custody.⁴²

The remaining five states in this category look to the child's maturity and reasoning ability rather than age in deciding whether or not to give weight to the child's preference.⁴³ In California, Connecticut, Hawaii, and Nevada, if the child is shown to have the capacity to form an intelligent preference as to where to live, the court must consider the child's wishes.⁴⁴ In Nebraska, the final state in this category, the child's wishes must only appear to be reasonable to require the court's granting weight.⁴⁵

37. MISS. CODE ANN. § 93-11-65 (2000) (emphasis added).

38. GA. CODE ANN. § 19-9-1(a)(3) (2000). "In all cases in which the child has reached the age of *fourteen* years, the child shall have the right to select the parent with whom he or she desires to live." (emphasis added) *Id.*

39. *Id.*

40. N.M. STAT ANN. § 40-4-9 (Michie 2000). "If the minor is *fourteen* years of age or older, the court shall consider the desires of the minor as to with whom he wishes to live before awarding custody of such minor." (emphasis added) *Id.*

41. TEX. FAM. CODE ANN. § 153.008 (Vernon 2000). "If the child is *twelve* years of age or older, the child may, by writing filed with the court, choose the managing conservator, subject to the approval of the court." (emphasis added) *Id.* Texas reduced the age from twelve years to ten years of age in the 2000 legislative session.

42. MD. CODE ANN. § 9-103 (2000). "A child who is *sixteen* years old . . . may file a petition to change custody." (emphasis added) *Id.*

43. These states include California, Connecticut, Hawaii, Nebraska, and Nevada. See CAL. FAM. CODE § 3042(a) (West 2000); CONN. GEN. STAT. § 46b-57 (2000); HAW. REV. STAT. § 571-46(3) (2000); NEB. REV. STAT. § 42-364(2)(b) (2000); NEV. REV. STAT. § 125.480(4) (2000).

44. See CAL. FAM. CODE § 3042 (a) (West 2000); CONN. GEN. STAT. § 46b-57 (2000); HAW. REV. STAT. § 571-46(3) (1999); NEV. REV. STAT. § 125.480(4) (2000).

45. NEB. REV. STAT. § 42-364(2) (2000). "The court shall consider . . . The desires and wishes of the minor child if of an age of comprehension regardless of chronological age, when such desires and wishes are based on sound reasoning." *Id.*

B. *Statutes Mandating Consideration*

The second most progressive preference statutes mandate that the courts *consider* the child's preference in custody determinations.⁴⁶ Although these statutes require that the court hear the child's preference, the judge retains nearly complete discretion as to its interpretation and utilization in the custody determination.⁴⁷ Twenty-one states and the District of Columbia require their courts to consider the child's preference as one of several factors in a custody determination.⁴⁸ Among these twenty-two jurisdictions, ten require their courts to consider the wishes of the child as to his or her custodian irrespective of other characteristics of the child such as age, maturity or intelligence.⁴⁹

Two of the remaining twelve states, Tennessee and Indiana, take the child's age into account in determining the weight to be accorded to the child's preference.⁵⁰ In Indiana, the court is required to consider the wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen years of age.⁵¹ In Tennessee, the court is required to consider the preference of any child twelve years of age or older; while still acknowledging that the court may consider the preference of younger children as well.⁵²

The remaining ten states in this category require courts to consider the preference of the child when the child is of sufficient age and capacity to form an intelligent decision.⁵³ Recognizing that children mature at different

46. Nemecheck, *supra* note 19, at 452.

47. *Id.* at 454.

48. *See supra* note 25.

49. These jurisdictions include: Arizona, Delaware, District of Columbia, Idaho, Illinois, Kansas, Kentucky, Missouri, Montana, and Wisconsin. *See* ARIZ. REV. STAT. § 25-403(A)(2) (2000); DEL. CODE ANN. tit. 13, § 722 (2000); D.C. CODE ANN. § 16-911(5)(A) (1999); IDAHO CODE § 32-717 (2000); 750 ILL. COMP. STAT. 5/602(a)(2) (West 2000); KAN. STAT. ANN. § 60-1610 (2000); KY. REV. STAT. ANN. § 403.270(2)(B) (2000); MO. REV. STAT. § 452.375 (2000); MONT. CODE ANN. § 40-4-212(1)(B) (2000); WIS. STAT. § 767.24 (2000).

50. *See* IND. CODE § 31-14-13-2(2), (3) (2000); TENN. CODE ANN. § 36-6-106 (2000).

51. IND. CODE § 31-14-13-2(2), (3). "In determining the child's best interests . . . [t]he court shall consider . . . (3) [t]he wishes of the child, with more consideration given to the child's wishes if the child is at least *fourteen* (14) years of age." (emphasis added) *Id.*

52. TENN. CODE ANN. § 36-6-106. "The court shall consider . . . (7) [t]he reasonable preference of the child if *twelve* (12) years of age or older. The court may hear the preference of a younger child upon request." (emphasis added) *Id.*

53. These states include: Alaska, Colorado, Iowa, Maine, Michigan, Minnesota, New Jersey, North Dakota, Virginia, and Washington. *See* ALASKA. STAT. § 25.24.150 (Michie 2000); COLO. REV. STAT. § 14-10-124 (2000); IOWA CODE § 598.41(3)(f) (2000); ME. REV. STAT. ANN. tit.19-A, § 1653 (West 2000); MICH. COMP. LAWS § 722.23(3)(i) (2000); MINN.

ages, these states give the courts the discretion to evaluate the child's maturity and ability to intelligently state a preference.⁵⁴

C. *Purely Discretionary Statutes*

Unlike the mandatory language discussed for the previous two categories, several states use purely discretionary language in their preference statutes.⁵⁵ These statutes *suggest* but do not require courts look to the child for a preference.⁵⁶ Seven states give the court discretion as to whether or not to consider a child's preference in a custody determination.⁵⁷ The wording of these statutes use language such as "the court may consider" as exemplified in the South Dakota code:

In awarding the custody of a child the court shall be guided by consideration of what appears to be for the best interest of the child in respect to the child's temporal and mental and moral welfare. If the child is of a sufficient age to form an intelligent preference, the court may consider that preference in determining the question.⁵⁸

The trend in jurisdictions with purely discretionary statutes is for courts to give the child's preference due consideration.⁵⁹ For example, in *Nazworth v. Nazworth*⁶⁰ an Oklahoma appellate court held that a thirteen year old boy's request to live with his father was required to be considered in determining whether to change the boy's custody.⁶¹ In *Connelly v. Connelly*⁶² a Louisiana appellate court held that the child's preference is an appropriate factor to

STAT. § 518.17 (2000); N.J. STAT. ANN. § 9:2-4 (West 1999); N.D. CENT. CODE § 14-09-06.2(1)(i) (2000); VA. CODE ANN. § 20-124.3 (Michie 2000); WASH. REV. CODE § 26.09.187(3)(vi) (2000):

54. *Id.*

55. Nemecheck, *supra* note 19, at 457.

56. *Id.*

57. *See supra* note 26.

58. S.D. CODIFIED LAWS § 25-4-45 (Michie 2000).

59. *See Nazworth v. Nazworth*, 931 P.2d 86, 88 (Okla. 4th Div. Ct. App. 1996); *see also Connelly v. Connelly*, 644 So. 2d 789 (La. 1st Cir. Ct. App. 1994); *Hutchison v. Hutchison*, 649 P.2d 38, 41 (Utah 1982).

60. 931 P.2d 86, 88 (Okla. 4th Div. Ct. App. 1996).

61. *Id.* at 88. The court opinioned that "where the preference is explained by the child and good reasons for the preference are disclosed, the preference and supporting reasons will justify a change of custody." *Id.* (citing *Yates v. Yates*, 702 P.2d 1252, 1254 (Wyo. 1985)).

62. 644 So. 2d 789, 789 (La. 1st Cir. Ct. App. 1994).

consider in determining custody of the child.⁶³ Similarly, in *Hutchison v. Hutchinson*⁶⁴ the Supreme Court of Utah held that in making a custody determination, the trial court may consider the preference of the child as one of the factors.⁶⁵ These courts all appear to be saying "listen to the children, it's their lives that will be most affected."

D. No Statutory Reference

The remaining ten states make no mention in their statutes of a child's preference in custody determinations.⁶⁶ However, even with no statutory guidelines, many of these states' courts give due consideration to the child's preference.⁶⁷ For example, in *Kenney v. Hickey*,⁶⁸ the Supreme Court of Rhode Island held that although the expressed preference of a minor child is not conclusive, such preference is competent and highly probative evidence.⁶⁹ Similarly, in *Wilcox-Elliott v. Wilcox*,⁷⁰ the Supreme Court of Wyoming held that a child's unequivocal preference to live with a particular parent must be considered.⁷¹ In *Hinkle v. Hinkle*,⁷² the Supreme Court of North Carolina gave considerable weight to the wishes of a child of sufficient age to exercise discretion in choosing a custodian.⁷³ The child reaches the age of discretion when he or she "is of an age and capacity to form an intelligent or rational view on the matter."⁷⁴ Further, in *Bak v. Bak*,⁷⁵ a

63. *Id.* at 795. The appellate court opined that great deference must be given to the trier of fact's findings; and therefor found no error in the lower court's findings that the child's testimony concerning his desire to remain with his mother was not credible. *Id.* at 796.

64. 649 P.2d 38, 38 (Utah 1994).

65. *Id.* at 41.

66. See discussion *supra* note 28.

67. See *Kenney v. Hickey*, 486 A.2d 1079, 1083 (R.I. 1985) (noting that "it has been our policy to afford a child's preference considerable weight"); see also *Wilcox-Elliott v. Wilcox*, 924 P.2d 419, 421 (Wyo. 1996) (noting that "[a] child's unequivocal preference to live with a particular parent is a factor which must be considered"); *Hinkle v. Hinkle*, 146 S.E.2d 73, 79 (N.C. 1966) (noting that "[t]he wishes of a child of sufficient age to exercise discretion in choosing a custodian is entitled to considerable weight"); *Bak v. Bak*, 511 N.E.2d 625, 631 (Mass. App Ct. 1987) (noting that the preference of a child is a factor to be considered).

68. 486 A.2d at 1079 (R.I. 1985).

69. *Id.* at 1084. The court also opined that "the weight to be given to the preference of the child is a matter within the sound discretion of the court." *Id.*

70. 924 P. 2d 419 (Wyo. 1996).

71. *Id.* at 421.

72. 146 S.E.2d 73 (N.C. 1966).

73. *Id.* at 79. The court opined that when the contest is between the parents, the child's preference is not controlling. *Id.*

74. *Id.*

Massachusetts appellate court held that the preference of a child is a factor to be considered in making child custody determinations.⁷⁶ These holdings exemplify the proposition that absent express legislation, the lawmakers of this nation still believe in the importance of consideration of a child's preference in custody decisions.

III. FLORIDA LEGISLATION

Florida's custody statute gives the court sole discretion on whether or not to consider a child's preference in making a custody determination.⁷⁷ Section 61.13 of the *Florida Statutes* provides guidelines for custody and support of children, visitation rights, and the power of the court in making related orders.⁷⁸ Specifically, section three provides "[f]or purposes of shared parental responsibility and primary residence, the best interests of the child shall include an evaluation of all factors affecting the welfare and interests."⁷⁹ Although the statute does suggest factors that may affect the child's welfare and interests,⁸⁰ subsection three leaves the consideration of any and all of the factors completely to the discretion of the court.⁸¹ This discretion includes the child's preference factor.⁸²

In contrast to Florida's custody statute, a number of other Florida statutes do mandate the consideration of the child's preference when determining the child's best interests.⁸³ The subjects of these statutes range from grandparental visitation rights⁸⁴ to child-in-need of service cases⁸⁵ to termi-

75. 511 N.E.2d 625 (Mass. App Ct. 1987).

76. *Id.* at 631. The appellate court also gave consideration to the report of one of the family's service officers as to the child's wishes. *Id.*

77. FLA. STAT. § 61.13 (2000).

78. *Id.*

79. § 61.13(3).

80. *Id.*

81. *Id.*

82. "The reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference." § 61.13(3)(i).

83. See FLA. STAT. § 752.01(2) (2000). "In determining the best interest of the minor child, the court shall consider . . . (c) [t]he preference of the child if the child is determined to be of sufficient maturity to express a preference." *Id.*; see also FLA. STAT. § 984.20(3)(a)(9) (2000) (stating "[t]he predisposition study shall cover . . . (9) [t]he reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference"); FLA. STAT. § 39.810 (2000) (stating "[i]n a hearing on a petition for termination of parental rights, the court shall consider . . . (10) [t]he reasonable preferences and wishes of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference")

84. § 752.01.

nation of parental rights.⁸⁶ For example, in a petition for termination of parental rights, the court is required to consider the reasonable preference and wishes of the child, if the court determines that the child is capable of expressing such a preference.⁸⁷ Similarly, in actions for grandparent visitation, the court is required to consider the preference of the child if the child is mature enough to express a preference.⁸⁸ In disposition hearings to determine custody of a child in need of service,⁸⁹ the court is required to consider the reasonable preference of the child.⁹⁰ These statutes, all covering topics relating to the child's residence and visitation, represent a legislative intent to listen to the preference of the children.

Recent bills introduced in both the Florida Senate and House of Representatives further exemplify legislative intent to give weight to children's wishes in various custody decisions. Examples include Florida Senate Bill 1176⁹¹ and House Bill 447.⁹² These companion bills provided instruction for judges in domestic violence cases.⁹³ Specifically, these bills provided for the prohibition of court awarded visitation rights to a parent who has been convicted of a capital felony or a first-degree felony that involved domestic violence.⁹⁴ The bills provided that this prohibition on visitation could be overridden by an agreement to the visitation by a child over sixteen years of age.⁹⁵ In other words, when the child stated a preference for visitation, this preference controlled the court's decision. The numerous bills introduced into the Florida Senate and House of Representatives historically every year containing similar language, further demonstrate that many Florida legislators acknowledge the need to modify the Florida custody statute. It is just a matter of time before the assertion of this article, that children's preferences should be considered in Florida custody decisions, will be added to Florida's custody statute.

85. § 984.20.

86. § 39.810.

87. *Id.*

88. § 752.01(2)(c).

89. § 984.20. The statute regulates the procedure for determining custody of a child who has been removed from his or her residence and taken into custody of the court for reasons such as domestic violence. *Id.*

90. *Id.*

91. S. 1176, 1999 Leg., 104th Sess. (Fla. 1999) (dying in committee on fiscal policy for unrelated reasons).

92. H.R. 447, Leg., 101st Sess. (Fla. 1999) (dying in committee on criminal justice appropriations for unrelated reasons).

93. S. 1176 at 1; H.R. 447 at 1.

94. *Id.*

95. *Id.*

IV. FLORIDA COURTS' INTERPRETATION OF THE LAW

A. *Supreme Court of Florida*

The highest court in Florida is the Supreme Court.⁹⁶ The Supreme Court of Florida has the power to determine the interpretation of the state's legislation for uniformity within the state's lower courts.⁹⁷ At its discretion, the Supreme Court of Florida reviews decisions of lower courts that expressly validate a state statute, construe a provision of the state or federal constitution, affect a class of constitutional or state officers, or directly conflict with a decision of another Florida court on the same question of law.⁹⁸ The Supreme Court of Florida also reviews certain categories of judgments, decisions, and questions of law certified to it by the district courts of appeal and federal appellate courts. The Supreme Court of Florida has the constitutional authority to issue a number of writs including an extraordinary writ.⁹⁹

The Supreme Court of Florida led the nation in giving children the opportunity to express their custodial preferences.¹⁰⁰ In 1887, in the unprecedented case of *Williams v. Williams*,¹⁰¹ the Supreme Court of Florida allowed three girls to remain with their father when they had all expressed a preference to do so, the father was able to give them a comfortable home and support, while the mother had no other means but alimony for support.¹⁰² A few years later, in *Marshall v. Reams*,¹⁰³ the court established what was later to become a national standard for giving a child the right to express his/her preference when the child has reached the age of intelligent discretion.¹⁰⁴ In *Marshall*, the child, Edward Reams, was over sixteen years old and desired to remain in the care of his uncle, F.F. Marshall, where he had resided since

96. FLA.'S COURT SYSTEM, at <http://www.flcourts.org/courts/supct/system2.html> (last visited Aug. 11, 1999).

97. *Id.*

98. *Id.*

99. "An extraordinary writ is an order commanding a person or entity to perform or to refrain from performing a particular act. They are by nature extraordinary and for that reason are not available as an alternative to the usual trial and appeal. Both by their historical development and by current judicial decisions, the writs are made available only in a narrow class of exceptional cases." *Id.*

100. Nemecheck, *supra* note 19, at 442.

101. 2 So. 768 (Fla. 1887).

102. *Id.* at 773. The evidence in this case included letters from the teenage daughters expressing strong preference to living with the father. *Id.* at 770.

103. 14 So. 95 (Fla. 1893).

104. Nemecheck, *supra* note 19, at 443.

his mother's death.¹⁰⁵ Henry Reams, Edward's father petitioned for custody of his out of wedlock son.¹⁰⁶ The Supreme Court of Florida reversed the lower court decision and allowed Edward to remain with his uncle.¹⁰⁷ The court in its precedent setting opinion held: "[w]here the child has reached the age of discretion it will often be allowed to make its own choice, although the person chosen is not one whom the court would voluntarily appoint."¹⁰⁸

Thereafter, throughout the next century, the Supreme Court of Florida continued to advocate the consideration of children's preference in custody cases.¹⁰⁹ Even when the preferences of the minor children were split, the court is willing to split up the children to meet these preferences.¹¹⁰ For example, in *Epperson v. Epperson*,¹¹¹ the three sons aged sixteen, twelve, and eight expressed a preference to live with their father, whereas the eighteen year old daughter wanted to remain with the mother.¹¹² The court declared that when boys of sixteen and twelve years of age express a decided preference to remain with one parent, this preference should be accorded due weight and allowed the sons to reside with the father and the daughter to reside with the mother.¹¹³

The Supreme Court of Florida also recognized the psychological affect of a refusal to consider a child's preference.¹¹⁴ For example, in *Eddy v. Staufer*¹¹⁵ the court held that a fifteen year old boy is at an age where he should have the ability to exercise reasonable discretion.¹¹⁶ The court opined: "[i]ndeed, the course of his life may be affected adversely by a

105. *Marshall*, 14 So. at 95.

106. *Id.*

107. *Id.* at 97.

108. *Id.* at 96 (quoting CHURCH, HABEUS CORPUS § 447).

109. *See Eddy v. Staufer*, 37 So. 2d 417, 418 (Fla. 1948) (holding that the desires of a fifteen year old boy should be given great weight); *see also Epperson v. Epperson*, 101 So. 2d 367 (Fla. 1958). The *Epperson* court held that when "normal and intelligent boys of the ages of 16 and 12 express a decided preference for the companionship of one parent over the other, we think their preference should be accorded due weight in settling the matter of custody." *Id.* at 370. *See also Gregory v. Gregory*, 313 So. 2d 735 (Fla. 1975). The court affirmed the trial judge's conclusion that "[w]e always listen to children of that age expressing views." *Id.* at 738.

110. *See Epperson*, 101 So. 2d at 368.

111. 101 So. 2d 367 (Fla. 1958).

112. *Id.* at 369.

113. *Id.* at 370. The court noted that "[t]he preference of the children is not absolutely controlling but it should be given considerable weight as between parents of relatively equal fitness." *Id.*

114. *See Eddy*, 37 So. 2d at 418.

115. 37 So. 2d 417 (Fla. 1948).

116. *Id.* at 418.

refusal of the Florida courts to consider his unquestioned preference.”¹¹⁷ Continuing along those lines, in *Gregory v. Gregory*,¹¹⁸ the Supreme Court of Florida disagreed with the district court’s statement that the courts are not bound by a child’s views because children sometimes don’t know what is best for themselves.¹¹⁹ In its opinion, the court pointed to the quality of the relationship between the father and son in this case for deciding what is the best for the son.¹²⁰

Despite the historical expression supportive of children’s preference over the first two-thirds of the past century, the Supreme Court of Florida has been silent on the subject in the past two decades, choosing to leave such decisions to the lower district courts of appeals.¹²¹ This silence has had the detrimental affect of creating chaos in Florida’s court system. With no strong direction from the highest court in the state, a diverse spectrum of interpretation of the law by the district courts has resulted.¹²²

B. *Florida’s District Courts of Appeal: Divided Interpretations*

In general, the Supreme Court of Florida does not hear the bulk of trial court decisions in Florida that are appealed.¹²³ Instead, they are reviewed by the District Courts of Appeal.¹²⁴ Prior to 1957, when the District Courts of Appeals were established in Florida, all appeals were heard solely by the Supreme Court of Florida.¹²⁵ The Florida Constitution now provides that the Legislature divide the State into appellate court districts with a District Court of Appeal serving each district.¹²⁶ Currently, there are five such

117. *Id.*

118. 313 So. 2d at 735.

119. *Id.* at 738. The son candidly expressed his preference to be with his father and stated that if he would rather go to a juvenile home then live with his mother. *Id.*

120. *Id.* The court held that:

The pole star of the cases before us is based upon the simplest element of all—the united relationship of the father and son and the quality it possesses in this instance for the bet welfare of the son. Unfortunately, good parental association has no single word in our language, however, sub judice the father and son have achieved it.

Id.

121. Research for this article failed to discover any Supreme Court of Florida opinions, in the past decade, expressing a stance with regard to child preference in custody decisions.

122. See discussion *infra* Parts IV.B.1., 5.

123. FLA.’S COURT SYSTEM, *supra* note 96.

124. *Id.*

125. *Id.*

126. *Id.*

districts headquartered in Tallahassee, Lakeland, Miami, West Palm Beach, and Daytona Beach.¹²⁷

The jurisdiction of the District Courts of Appeal extends to appeals from final judgments and orders of trial courts either not directly appealable to the Supreme Court of Florida or not taken from a county court to a circuit court, and to the review of certain non-final orders.¹²⁸

The District Courts of Appeals have also been granted constitutional authority to issue the extraordinary writs of certiorari, prohibition, mandamus, quo warranto, and habeas corpus, as well as all other writs necessary to the complete exercise of their jurisdiction.¹²⁹

As a general rule, decisions of the District Courts of Appeal represent the final appellate review of litigated cases.¹³⁰ A person who is displeased with a district court's express decision may ask for review in the Supreme Court of Florida or in the United States Supreme Court, but neither tribunal is required to accept the case for further review; the overwhelming number of requests are in fact denied.¹³¹

In past history, all five of the district courts gave credence to a child's preference in child custody modification proceedings.¹³² Further, they tended to uphold lower courts rulings.¹³³ Over the past two decades, however, the courts have divided. Some Districts Courts reversing modifications granted by the lower courts and surprisingly giving little weight to the expressed preferences of the children involved, others giving some consideration, while still others remaining dedicated to listening to the preferences of the children.¹³⁴

127. *Id.*

128. FLA.'S COURT SYSTEM, *supra* note 96.

129. *Id.*

130. *Id.*

131. *Id.*

132. *See* Martin v. Martin, 215 So. 2d 80, 82 (Fla. 1st Dist. Ct. App. 1968) (allowing the children to remain with their father based on their admitted preference to do so); *see also* Udell v. Udell, 151 So. 2d 863, 864 (Fla. 2d Dist. Ct. App. 1963) (holding that a judge should give weight to the expressed desires of a child); Goldstein v. Goldstein, 264 So. 2d 49, 52 (Fla. 3d Dist. Ct. App. 1972) (holding that the expressed desire of a child is entitled to weight).

133. *See* Burley v. Burley, 438 So. 2d 1055, 1056 (Fla. 4th Dist. Ct. App. 1983) (holding that a minor child's preference shall be given "such weight as the trial court determines appropriate"); *see also* Udell, 151 So. 2d at 864 (noting that the trial judge is in a more advantageous position than an appellate court to determine the problems in each divorce case).

134. *See* discussion *infra* Parts IV.B.1., 5.

1. First District Court of Appeal of Florida: No Weight Given

The First District Court of Appeal of Florida gives very little weight to the expressed preferences of children in child custody cases.¹³⁵ Further, in custody modification cases, this court advocates leaving the children wherever the original decree had placed custody.¹³⁶ The First District requires the non-custodial parent, who seeks modification of an earlier custody award, to first prove a substantial change of circumstances and secondly prove that the welfare of the child would be promoted by the changed custody.¹³⁷

The First District requires that the non-custodial parent seeking to modify a prior award of custody carry an extraordinary burden.¹³⁸ In *Holmes v. Green*¹³⁹ both children¹⁴⁰ expressed a strong desire to have their primary residence changed;¹⁴¹ and the trial court had found that the welfare of the children would best be served by the transfer of their primary residence to their father.¹⁴² However, the First District Court of Appeal held that the evidence presented was insufficient¹⁴³ and the trial court abused its discretion when it changed the primary residence of the two girls.¹⁴⁴

135. See *Zediker v. Zediker*, 444 So. 2d 1034, 1036 (Fla. 1st Dist. Ct. App. 1984) (holding that even if the children had all "evinced a clear and definite desire to live with their father and not with their mother, that preference would not alone be dispositive of the issue whether their best interests would be served by ordering a change in custody"); see also *Brown v. Brown*, 300 So. 2d 719, 726 (Fla. 1st Dist. Ct. App. 1974) (holding that allowing minor children to pick and choose the parent with whom they will reside is not in the best interest of the child.); see also *Holmes v. Green*, 649 So. 2d 302, 305 (Fla. 1st Dist. Ct. App. 1995) (citing *Elkins v. Vander*, 433 So. 2d 125 (Fla. 3d Dist. Ct. App. 1983) which held "[t]he law does not give children the unfettered discretion to choose the parent with whom they will live").

136. See *Zediker*, 444 So. 2d at 1038 (noting that the appellate court's task is only to determine whether the trial judge's discretion is supported in the record).

137. *Id.* (quoting *Stearns v. Szikney*, 386 So. 2d 592, 594 (Fla. 5th Dist. Ct. App. 1980)).

138. *Id.* at 1036 (quoting *McGregor v. McGregor*, 418 So. 2d 1073, 1074 (Fla. 5th Dist. Ct. App. 1982)).

139. 649 So. 2d 302 (Fla. 1st Dist. Ct. App. 1995).

140. The children were twelve year old twin daughters. *Id.* at 303.

141. *Id.* at 304.

142. *Id.*

143. The evidence presented demonstrated domestic violence and marital disharmony in the mother's home and that the mother worked odd hours and weekends. *Id.* at 303.

144. *Holmes*, 649 So. 2d at 304. "The evidence is insufficient to sustain the trial court's order changing the primary residence of the parties' children. Accordingly, that order is reversed." *Id.* at 305.

The First District lacks confidence in children's ability to make decisions about their residence.¹⁴⁵ Although the court declared that if the child possesses sufficient maturity and understanding to make an intelligent choice, it will be considered, it did not accept that two twelve year old girls have this intelligence level.¹⁴⁶ In *Holmes*, the court opined that even if the child is shown to possess the necessary traits to make the decision, this preference alone is not sufficient to sustain a change in primary residence.¹⁴⁷

The case of *Brown v. Brown*¹⁴⁸ exemplifies the First District's lack of confidence in children's decision making ability. In *Brown*, the final judgment dissolving the marriage of the parties gave custody of the children to the mother; but included a clause allowing the children to live with their father if they chose without further order of the court.¹⁴⁹ The First District found this clause to be in error, holding that allowing minor children to pick which parent they live with is not in the best interests of the children.¹⁵⁰

One case anomaly in the First District, upheld a change of custody. In *Martin v. Martin*,¹⁵¹ the First District held that the two-part test had been satisfied.¹⁵² In *Martin*, the father requested a permanent change in custody based on the children's¹⁵³ expressed preference to remain with the father and evidence of the poor condition of their mother's home.¹⁵⁴

Notwithstanding the *Martin* opinion, the general opinion of the First District is summarized in this quotation from *Holmes v. Green*:

The law does not give children the unfettered discretion to choose the parent with whom they will live, . . . or gratify the wishes of children at the expense of the rights of a parent Were it otherwise, the law would encourage manipulation by both children and

145. See *Brown*, 300 So. 2d at 726. "Allowing minor children to pick and choose at their will the parent with whom they will reside only invites then to 'play one parent against the other.'" *Id.*

146. *Holmes*, 649 So. 2d at 305.

147. *Id.* at 305.

148. 300 So. 2d at 719.

149. *Id.* at 720. The final judgment dissolving the marriage included the statement "[t]he wife shall have custody of the children of the parties . . . with the court allowing . . . [the children] to live with their father if this is their desire, without further order of this Court." *Id.*

150. *Id.* at 726.

151. 215 So. 2d 80 (Fla. 1st Dist. Ct. App. 1968).

152. *Id.* at 82.

153. The children were eleven and thirteen years of age. *Id.* at 81.

154. The mother lived in Italy and had written the father requesting he take the children because of the poor conditions in her home. *Id.*

parents and foster a breakdown in discipline, neither of which is in the best interests of the children.¹⁵⁵

2. Second District Court of Appeal of Florida: Change of Viewpoint

Over the years, Florida's Second District Court of Appeal changed its position on the weight given to a child's preference in custody proceedings. Historically, the Second District gave deference to the child's preference in custody determinations.¹⁵⁶ In the past decade, however, the Second District has required the extraordinary burden test to be satisfied before upholding a modification to a child custody decree.¹⁵⁷

In 1974, in an opinion combining the cases of *Taylor v. Schilt*¹⁵⁸ and *Gregory v. Gregory*,¹⁵⁹ the Second District considered the weight to be given to children's preferences in custody litigation.¹⁶⁰ In *Taylor*, the second district held that children old enough to have a well considered judgment, who unanimously want to live with their mother, in whose home they find love and good care, should be placed with their mother.¹⁶¹ Both parents in *Taylor* were found to be fit parents, and the children aged eleven to fifteen years old testified that their mother's home was full of love and the father's full of fear.¹⁶² Based upon the children's preferences and testimony, the court allowed the change of custody, recognizing that the course of a child's life might be adversely affected by the court's refusal to consider his/her

155. *Holmes*, 649 So. 2d at 305 (quoting *Elkins v. Vanden Bosch*, 433 So. 2d 1251, 1253 (Fla. 3d Dist. Ct. App. 1983)).

156. See *Taylor v. Schilt*, 292 So. 2d 47, 49 (Fla. 2d Dist. Ct. App. 1974) (noting that "children old enough to have well considered judgment, who unanimously want to live with their mother, in whose home they find love and good care, should be placed with their mother"); see also *Udell v. Udell*, 151 So. 2d 863, 864 (Fla. 2d Dist. Ct. App. 1963) (noting that a "judge should and does give weight to the expressed desires of a child to be in the custody of a particular parent").

157. See, e.g., *Gibbs v. Gibbs*, 686 So. 2d 639 (Fla. 2d Dist. Ct. App. 1996) (two consistent requirements to explain the extraordinary burden test).

First, the party seeking to modify a custody decree must plead and establish that circumstances have substantially changed since the final judgment. . . . Second, the petitioner must establish that the change has such an important impact on the child that the court is justified in imposing a change of custody in the 'best interest' of the child.

Id. at 641.

158. 292 So. 2d 47 (Fla. 2d Dist. Ct. App. 1974).

159. 313 So. 2d 735 (Fla. 1975).

160. 292 So. 2d at 48.

161. *Id.*

162. *Id.*

preference.¹⁶³ Similarly, in *Udell*, the court upheld a thirteen-year-old child's preference to remain with her father.¹⁶⁴ In *Udell*, both the father and mother were found to be proper custodians of the child.¹⁶⁵ Thus, preference of the child became the deciding factor.¹⁶⁶

In *Eades v. Dorio*,¹⁶⁷ a case deciding custody between a father and the maternal grandparents, the Second District allowed the children to remain with the grandparents based on the expressed preferences of the children.¹⁶⁸ Although the appellate court admitted that the rights of parents would not be disregarded to meet the wishes of a child, it further held that the court of appeals cannot overturn a decision by a chancellor who had the opportunity to observe the parties and witnesses and other intangibles.¹⁶⁹

In the past decade, however, the Second District Court of Appeal completely reversed its position, and has typically overturned modifications of child custody granted by lower courts.¹⁷⁰ The Second District's interpretation of the two-part extraordinary burden test outlined in *Gibbs v. Gibbs*¹⁷¹ created a new requirement that there be some significant inadequacy of care provided by the custodial parent before a modification of custody would be considered.¹⁷² The difficulty in proving significant inadequacy of care provided by the custodial parent has led to a consistent overturning of modification decrees. The Second District Court of Appeal justified its deaf ear towards the child's wishes in *Chant* by stating that courts should not micro-manage a child's custody.¹⁷³ In contrast to this excuse made in *Chant*, in

163. *Id.* at 50.

164. 151 So. 2d 863, 865 (Fla. 2d Dist. Ct. App. 1963).

165. *Id.* at 864.

166. *Id.* The appellate court opinioned that the testimony before the court could have shown that it was better for the minor daughter to remain in the custody of either parent and therefor the lower court's discretion would not be disturbed. *Id.*

167. 113 So. 2d 232 (Fla. 2d Dist. Ct. App. 1959).

168. *Id.* at 234. The children were eleven and thirteen, expressed a desire to live with the maternal grandparents and no desire to remain with the natural father. *Id.*

169. *Id.*

170. See *Chant v. Chant*, 725 So. 2d 445, 448 (Fla. 2d Dist. Ct. App. 1999) (reversing lower court's ruling with directions to reinstate the mother as the children's primary residential parent); see also *Gibbs*, 686 So. 2d at 645 ("reversing and remanding for entry of an order reinstating the mother as custodial parent").

171. See *Gibbs*, 686 So. 2d at 639.

172. See *Chant*, 725 So. 2d at 447 (quoting *Gibbs*, 686 So. 2d at 641. "This test involves more than a decision that the petitioning parent's home would be 'better' for the child, and requires a determination that there is some significant inadequacy in the care provided by the custodial parent.").

173. *Chant*, 725 So. 2d at 448. "[T]he best interests test is not intended to allow the court to micromanage a child's custody from the entry of the final judgment until the child becomes an adult." *Id.*

Heatherington v. Heatherington,¹⁷⁴ the court did micromanage the child's custody by not allowing the child's preference to be adhered to even when the child threatened to run away if made to live with the other parent.¹⁷⁵ Observe how the court changes its reasoning based on the overriding desire not to listen to children's preferences. This "new" Second District Court of Appeals apparently does not see the adverse impact its decision not to consider a child's preference has on that child's life.

3. Third District Court of Appeal of Florida: Confusion

Until the mid-1970s, the Third District Court of Appeal gave controlling weight to a child's preference in child custody proceedings.¹⁷⁶ During that time period, the Third District consistently held the belief that the custody of a minor child is a proper subject for judicial consideration at any time by the court that granted the divorce decree.¹⁷⁷ In *Goldstein v. Goldstein*,¹⁷⁸ the court stated that a child's preference was entitled to great weight in cases where the child is mature enough to make a reasonable choice.¹⁷⁹ Although both parents were found to be fit in *Goldstein*, the child's preference and statements that he would leave home if his wishes were not adhered to was found to be detrimental enough to accord the modification of custody.¹⁸⁰

In *Pollak v. Pollak*,¹⁸¹ the Third District Court of Appeal upheld a chancellor's determination of custody in accordance with each of the children's expressed individual preferences even though it meant splitting up the children.¹⁸² Likewise, in *Borden v. Borden*,¹⁸³ the fifteen year old son pre-

174. 677 So. 2d 1312 (Fla. 2d Dist. Ct. App. 1996).

175. *Id.* at 1314. The child commented that she might run away if forced to live with her father and the trial judge was concerned with this comment. *Id.* at 1313. The appellate court disregarded the trial judge's discretion and reversed. *Id.* at 1314.

176. *See* *Goldstein v. Goldstein*, 264 So. 2d 49, 52 (Fla. 3d Dist. Ct. App. 1972) (holding that the desire of a mature child is entitled to weight); *see also* *Pollak v. Pollak*, 196 So. 2d 771, 772 (Fla. 3d Dist. Ct. App. 1967) (holding that children's preferences are to be given some weight); *Borden v. Borden*, 193 So. 2d 15, 16 (Fla. 3d Dist. Ct. App. 1966) (holding that the desires of a fifteen year old should be given great weight).

177. *Goldstein*, 264 So. 2d at 51 (quoting *Frazier v. Frazier*, 147 So. 464 (Fla. 1933)).

178. 264 So. 2d 49 (Fla. 3d Dist. Ct. App. 1972).

179. *Id.* at 52.

180. *Id.* The child, Herbert Goldstein, was fourteen years of age and the trial court had found that there was a likelihood that the boy would leave home if required to remain with his mother. *Id.*

181. 196 So. 2d 771 (Fla. 3d Dist. Ct. App. 1967).

182. *Id.* at 772. In this case two of the sons preferred to be with their father, one son had no preference, and the daughter preferred to remain with their mother. *Id.* The court

ferred to live with the father, whereas the twelve year old daughter preferred not to make a choice.¹⁸⁴ The *Borden* court held that the son's preference was sufficient to grant custody of both children to the father.¹⁸⁵

In 1975, a major departure in the consistent Third District Court of Appeal's opinions occurred. From that time forward, this court's diverse handling of children's preferences in custody proceedings has created major confusion in the district. The cause of this diversity appears to be the interpretation of the Third District's requirement that the parent seeking to reverse a custody order modification must establish its unreasonableness or an abuse of discretion.¹⁸⁶ In one interpretation, *Gaber v. Gaber*,¹⁸⁷ a child's preference was the key factor in modification of custody by the trial court.¹⁸⁸ The Third District Court reversed the trial court's decision stating that "the child's wish is merely a factor to be considered . . . [but] not a dispositive factor."¹⁸⁹ Similarly, in *Kitchens v. Kitchens*,¹⁹⁰ the court stated that it is not required to consider a child's preference in modification of custody proceedings.¹⁹¹ Most recently, in *Perez v. Perez*,¹⁹² the court held that the stated preference of a fifteen and eleven year old child, without more, was insufficient to sustain a change in primary residence.¹⁹³ In contrast, in *Walfish v. Walfish*,¹⁹⁴ the Third District stated that the trial court, in making a determination of custody, may properly consider the wishes of the child.¹⁹⁵ In still another interpretation, *Berlin v. Berlin*,¹⁹⁶ the court held that consideration of children's preferences was limited to those of a child mature enough to make a reasonable choice.¹⁹⁷

disregarded a policy proposed by the mother that the children all be awarded to one parent in favor of adhering to the children's individual preferences. *Id.*

183. 193 So. 2d 15, 15 (Fla. 3d Dist. Ct. App. 1966).

184. *Id.* at 16.

185. *Id.*

186. *Id.*

187. 536 So. 2d 381 (Fla. 3d Dist. Ct. App. 1989).

188. *Id.* at 382.

189. *Id.* The dissent in this case argues that the trial court's decision should be upheld based on principles set forth in *Goldstein*, *Epperson*, and *Purdon*. *Id.*

190. 305 So. 2d 249 (Fla. 3d Dist. Ct. App. 1975).

191. *Id.* at 250.

192. 767 So. 2d 513 (Fla. 3d Dist. Ct. App. 2000).

193. *Id.* at 519.

194. 383 So. 2d 274 (Fla. 3d Dist. Ct. App. 1980).

195. *Id.* at n.1. Note the contrast in the fourteen year old *Gaber* child's preferences not being accorded consideration and the eight and ten year old *Walfish* children's preferences being accorded consideration.

196. 386 So. 2d 577 (Fla. 3d Dist. Ct. App. 1980).

197. *Id.* at 579.

Factual similarities do not necessarily lead to similar opinions in the Third District Court of Appeal. For example, the court in *Walfish* held that despite the child's preference to live with their father and the findings that the father was a fit parent, the failure to show that the mother was unfit prohibited the modification granted by the lower court.¹⁹⁸ In a similar factual case, *Elkins v. Vanden Bosch*¹⁹⁹ the court held that the stated preference of children to be in the custody of the father is not a material change of circumstance that will support a custody change.²⁰⁰ The inconsistency or vacillation of this court over similar facts and circumstances tends to give the impression of indecision over the subject matter.

4. Fourth District Court of Appeal of Florida: Quiet Consideration

In the handful of cases heard on the subject, the Fourth District Court of Appeal has considered the child's preference as one of a number of equally considered factors in a custody determination.²⁰¹ For example, in *Burley v. Burley* the Fourth District held that a change in preference by a minor child may be considered and "given such weight as the trial court determines appropriate."²⁰² The Fourth District supports the belief that the parent seeking a change in custody shoulders a heavy burden.²⁰³ Further, the Fourth District Court of Appeal gives general deference to the trial court's decisions in such cases.²⁰⁴ Preference by one or more minor children as to which parent shall have custody is given as much weight as the trial court determines appropriate.²⁰⁵ In *Brown v. Brown*,²⁰⁶ the Fourth District Court of Appeals upheld the trial court's determination of custody based on the minor children's wishes.²⁰⁷ The lower court in *Brown* had placed the fourteen and sixteen year old children in the custody of their father based on the children electing to live with their father.²⁰⁸ Although only a few cases have been considered by the Fourth District in recent years, it's quiet avocation of children's rights to be heard in custody decisions follows the national trend admirably.

198. *Walfish*, 383 So. 2d at 276.

199. 433 So. 2d 1251 (Fla. 3d Dist. Ct. App. 1983).

200. *Id.* at 1252.

201. *See Burley v. Burley*, 438 So. 2d 1055, 1056 (Fla. 4th Dist. Ct. App. 1983).

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. 409 So. 2d 1133 (Fla. 4th Dist. Ct. App. 1982).

207. *Id.*

208. *Id.* at 1035.

5. Fifth District Court of Appeal of Florida: The Advocate

The Fifth District Court of Appeal consistently advocates giving weight to the preferences of children in custody determinations.²⁰⁹ In *Greene v. Kelly*, the Fifth District Court of Appeal relied heavily on the national trend rather than the Florida trend to give greater deference to the child's preference and opinion.²¹⁰ Further in *Greene*, the Fifth District opinioned that the law recognizes a child's preference, if the child is of sufficient maturity, as a factor in the determination of custody.²¹¹ This court equated a child now being able to realistically make a preference when she could not do so at the time of the original custody order as a change in circumstances sufficient to make a custody modification.²¹² In *Greene*, the thirteen year old daughter was awarded to the mother at the time of the dissolution of marriage, when the daughter was less than four years old.²¹³ Ten years later, she requested a change in custody to live with her father.²¹⁴ The Fifth District upheld the modification based on the daughter's preference.²¹⁵ In another case regarding grandparent visitation, *Ward v. Dibble*,²¹⁶ the children, aged fifteen and sixteen, testified that they did not want to go on visitation with their grandmother.²¹⁷ The court upheld the children's wishes and denied the visitation with the grandmother.²¹⁸ The consistency of the Fifth District in upholding the rights of children to be heard in Florida's custody decisions should serve as a role model for the rest of the Florida court system.

V. JUDGES ARE NOT LISTENING

Although Florida statutes do not require a court to follow the expressed wishes of a child in a custody case, they do suggest the judge consider the child's preferences as one factor.²¹⁹ In Florida, the weight that judges actually give to a child's preference varies greatly as illustrated in the previous

209. See, e.g., *Greene v. Kelly*, 712 So. 2d 1201 (Fla. 5th Dist. Ct. App. 1998). "A child's preference is a consideration even in the determination of whether a change of circumstances has occurred." *Id.* at 1202.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Greene*, 712 So. 2d at 1202.

214. *Id.*

215. *Id.* at 1203.

216. 683 So. 2d 666 (Fla. 5th Dist. Ct. App. 1996).

217. *Id.* at 668.

218. *Id.* at 670.

219. FLA. STAT. § 61.13(3)(i) (2000).

discussion of Florida's courts.²²⁰ Judges typically base decisions on intuition and a common understanding of social norms as opposed to any systematic use of child development theory and research to inform such decisions.²²¹

Studies of the attitudes of judges towards children's participation in custody proceedings indicate that the child's preference was typically not accorded significant weight.²²² In fact, in one study 115 Indiana judges were asked to rank factors important to custody decisions, children's preferences regarding where they want to live was at the bottom of the list of factors.²²³ However, in Virginia, one survey of judges found that there was a clear correlation between the age of the child and the weight given her preference.²²⁴ Nearly ninety percent of the judges surveyed indicated that the preference of children aged fourteen and older was either dispositive or extremely important; whereas that of children aged below ten were discounted significantly.²²⁵

Indicative of judges' general disregard for the importance of listening to children in custody determinations is the small amount of time the judges typically spend with the children to evaluate their preferences. For example, a study of twenty-six judges in Michigan found that judges spent an average of only eighteen minutes with children who were the subject of custody battles.²²⁶ Another study indicated that fifteen minutes was the norm for judges in Colorado.²²⁷

Critics suggest that the brief judicial interviews are an inadequate means for ascertaining a child's real preference in a custody dispute.²²⁸ One major source of error is the judges' reluctance to ask direct questions of the child for fear of causing pain to the child.²²⁹ Judges instead infer preference from other questions asked of the child, leading to frequent error in the judge's inference.²³⁰

Although not a complete solution, a statutory mandate to consider children's preferences in custody determinations would at least remove a major part of the disorder created by the combination of the inconsistency in

220. See discussion *supra* Part IV.

221. Mlyniac, *supra* note 10, at 1889.

222. Scott, *supra* note 11, at 1043 n.22.

223. Michael H. Hodges, *Judges Agree on the Issues in Divorces, Study Says*, DETROIT NEWS, June 17, 1996 at B1.

224. Scott, *supra* note 11, at 1050.

225. *Id.*

226. Mlyniac, *supra* note 10, at 1887.

227. *Id.* at n.86.

228. Scott, *supra* note 11, at 1055.

229. *Id.* at 1056.

230. *Id.*

the Florida courts and the tendency of the judges not to correctly interpret children's wishes.

VI. RECOMMENDATION

The broad grant of discretion given judges by Florida's custody statute does not always result in providing for the best interests of the child. The result includes indeterminate outcomes and difficult settlement negotiations.²³¹ Explicit statutory guidance is required. Statutory guidance would enhance certainty and predictability in the decision making process. Statutory guidance would further eliminate the likelihood of misunderstanding facts and circumstances and allowing biases to interfere with decisions.²³² Lending certainty to custody determinations through the use of an easily applied rule leads to an outcome in line with the legal objective: a custody decision that reflects the best interests of the child.²³³

Florida legislators have taken the first step with statutes mandating consideration of children's preference in other related issues. It's now time to align Florida's custody statute with these other Florida statutes and with the statutes and case law of the rest of the nation.

Understandably, it is expected that Florida judges will be opposed to such statutory mandates. For example, a Virginia study revealed that although in practice the judges were deferential towards the wishes of older children, many judges were opposed to limits on judicial discretion.²³⁴ Such opposition is outweighed by the benefit to Florida's growing population of single-parent households.

VII. CONCLUSION

The parameters established by the United States Supreme Court's jurisprudence demonstrate that the way to secure children's rights is to empower them to exercise those rights as soon as they are able to do so.²³⁵ The Supreme Court of Florida in 1887 initiated the national trend towards listening to children's wishes in custody determinations. It is now time for Florida to go back to its roots and re-institutionalize this policy; to follow the guidelines of the United States Supreme Court, and empower the children of Florida by statutorily mandating that they be seen and heard in Florida custody determinations.

Randi L. Dulaney

231. Kandel, *supra* note 8, at 338.

232. *Id.*

233. Scott, *supra* note 11, at 1063.

234. *Id.* at 1051.

235. Kandel, *supra* note 8, at 348.